A **MOHD IFTITAH ISMAIL (AS ADMINISTRATOR OF THE ESTATE OF ISMAIL BARLIAR, DECEASED) v. DATO' HASAN MALEK**

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: N-02(NCVC)(W)-955-06-2015]
2 SEPTEMBER 2016

C ***TRUST:*** *Resulting trust – Purchase of land in name of another – Land purchased using monies from several sources – Whether there was sufficient evidence to establish intention to create resulting trust*

The respondent, a Deputy Minister, had used his personal assistant's name ('the deceased') as nominee to acquire a property from the State Government. A loan was obtained and the property was charged by the
D deceased while the respondent acted as the guarantor. The costs for the purchase and construction did not come solely from the respondent as the latter used, *inter alia*, (i) the people's money; (ii) the deceased's insurance; and (iii) the appellant's personal money. At the High Court, it was held that there was a resulting trust as the respondent did not purchase the disputed
E property solely with his money. Hence, the present appeal. The issue that arose for the court's adjudication was whether there was a resulting trust.

Held (allowing appeal with costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

F **(1)** It was not the respondent's money which was entirely used to secure the property. The conduct of acquiring the insurance policy as well as receiving the money towards the loan attracted the concept of fraud and/or criminal conduct against the insurance company. The court should not have entertained an equitable relief which was discretionary in
G nature when the general norms of equity had been violently breached. (paras 10 & 12)

Bahasa Malaysia *Headnotes*

Responden, seorang Timbalan Menteri, telah menggunakan nama pembantu peribadinya ('si mati') sebagai penama untuk mendapatkan satu hartanah
H daripada Kerajaan Negeri. Pinjaman diperoleh dan hartanah tersebut dipajak pada si mati manakala responden bertindak sebagai penjamin. Kos pembelian dan pembinaan bukan daripada responden sahaja kerana beliau menggunakan, antara lain (i) wang rakyat; (ii) insurans si mati; dan (iii) wang simpanan perayu. Di Mahkamah Tinggi, diputuskan bahawa wujud amanah
I berbangkit kerana responden tidak membeli hartanah tersebut menggunakan duitnya sahaja. Oleh itu, timbul rayuan ini. Isu bagi pertimbangan mahkamah adalah sama ada wujud amanah berbangkit.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Wang yang digunakan untuk mendapatkan hartanah tersebut bukan milik responden seorang. Tindakan mendapatkan polisi insurans dan menerima wang bagi pinjaman membangkitkan konsep penipuan dan/atau perilaku jenayah terhadap syarikat insurans. Mahkamah tidak sewajarnya melayan relief berekuiti yang bersifat budi bicara apabila norma-norma am ekuiti telah dilanggar.

Case(s) referred to:
Datuk M Kayveas v. Chong Chek Ah & Ors [2011] 1 LNS 380 HC ***(refd)***
Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***
Dyer v. Dyer [1788] 2 Cox Eq Cas 92 ***(refd)***
Issac Iyadurai Nallaperumal & Ors v. Vedha Ratnam Valiappan & Anor [1993] 4 CLJ 149 HC ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Patel v. Mirza [2016] UKSC 42 ***(refd)***
Tneu Beh v. Tanjong Kelapa Sawit Sdn Bhd & Ors [1995] 1 CLJ 741 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the appellant - Abdul Razak Ismail, Mohd Radzuan Ibrahim & Siti Noryani; M/s Radzuan Ibrahim & Co
For the respondent - Manian Raju, Zatul Izra Zulkefelee & Elizabeth Low; M/s Krishna Dallumah, Manian & Indran

[Editor's note: Appeal from High Court, Seremban; Civil Suit No: NCVC 22-153-09-2012 (overruled).]

Reported by Najib Tamby

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/first defendant (the administrator of the estate of Ismail bin Barliar (deceased)) appeals against the decision of the learned High Court Judge who held that there was a resulting trust when there was clear evidence to show that the respondent did not purchase the disputed property solely with his money.

Brief Facts

[2] The plaintiff/respondent at the material time was a Deputy Minister and subsequently holding other State position had used the deceased's name purportedly as nominee to acquire the disputed property from the State Government. The deceased at the material time was the plaintiff's personal

A assistant. (Whether such conduct is permissible under the law is a matter which the trial court ought to have taken cognisance for reasons stated below).

[3] A building was constructed on the said property from a loan obtained wherein the property was charged by the deceased and the plaintiff was the
B guarantor. From the evidence, it was clear that the total costs for the purchase as well as the construction of the building did not come solely from the plaintiff. Notwithstanding the fact, the plaintiff was only a guarantor to the loan, the plaintiff managed to lead evidence through officers of the bank (SP2 and SP3) to say that the bank officers knew that the property was not the
C deceased's and it was purchased for the benefit of the plaintiff. Basically, the bank officers' evidence demonstrated that they had compromised the salient features of accountability, transparency and good governance when they took the position that is contrary to the facility agreement as well as the guarantee and the evidence would also impinge on several provisions of the Evidence
D Act 1950 (EA 1950). (See ss. 91, 92, etc of the EA 1950)

[4] The conduct of the plaintiff as well as the bank officers *per se* attracts the concept of illegality as well as public policy. However, it was not the pleaded case of the first defendant and in consequence the learned trial judge did not deal with the issue though was bound to deal with such issues as was
E recently held by the Federal Court in the case of *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212. On the issue of illegality and public policy, the recent judgment of the Supreme Court of England in the case of *Patel v. Mirza* [2016] UKSC 42 is instructive. In that case, Lord Toulson reiterated well established principles in this area of
F jurisprudence to say that:

(i) no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act; and

(ii) illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment,
G and in a wide variety of circumstances.

[5] Learned counsel for the plaintiff/respondent described the clouded and/or sham transaction by the plaintiff who at the time was holding public office as follows:

H (a) ... the respondent used: (1) people's money to pay the loan (Tabung Kebajikan Dialisis Kuala Pilah); (2) the deceased's insurance amount of RM185,236.00 and RM2,699.88 to pay the loan; (3) the appellant's personal money amount of RM15,000.00; and (4) no evidence for another balance of RM400,000.00;

I (b) the respondent's allegation that the respondent used the deceased's name to apply and acquire the said land from the State Government, the respondent paid the premium for the acquisition of the said land but the said land was registered in the name of the

deceased; all of these are triable issues and it is not a fact. The deceased had already died and the court could not take statement only from the respondents.

(c) reference to the respondent's position as assemblyman and Member of Parliament for obtaining loan from Maybank and using the deceased's name, a government servant, for the loan and to acquire the said land from the State Government are absolutely wrong and illegal;

(d) the respondent's further submission at paragraphs 2 and 3 are inconsistent with the judgment of the Federal Court per Jeffrey Tan FCJ in the case of *Merong Mahawangsa Sdn Bhd v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212, and held (2) and (3):

> (2) Section 24 of the Act stipulated five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by law; (b) it is of such nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral or opposed to public policy. The considerations or objects referred to in paras (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void.
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> (3) It was plain and obvious that the consideration was unlawful and the letter of undertaking was void. On that ground, the claim should have been dismissed. An agreement, the object of which is to use the influence with the Ministers of Government to obtain a favourable decision, is destructive of sound and good administration. It showed a tendency to corrupt or influence public servants to give favourable decisions otherwise than on their own merits. Such an agreement is contrary to public policy. It is immaterial if the persons intended to be influenced are not amenable to such recommendations.

[6] We do not wish to labour on the issue of illegality or public policy as it is clear from the evidence that the plaintiff had not made out a case for resulting trust as per the pleaded cause of action. We do not wish to set out the facts and the evidence of the plaintiff and the bank officers as it has been partly dealt by the learned trial judge and the issue here is only whether in law and fact there arises a resulting trust. This judgment must be read with the judgment of the trial court to appreciate the facts in the right perspective.

[7] We have read the appeal record and the submission of the parties. After much consideration to the submission of learned counsel for the plaintiff, we take the view that the appeal must be allowed. Our reasons, *inter alia*, are as follows:

(i) The learned plaintiff's counsel said that:

> The pivotal issue
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> The principal issue in this case is whether there is a resulting trust ie, whether the deceased, Ismail bin Barliar (hereinafter referred to as "the deceased") held the property under Hakmilik No. PM883 Lot 7051 (formerly known as H.S.(M) 1884, PT 2285) Mukim Ulu Muar, Daerah Kuala Pilah, Negeri Sembilan Darul Khusus (hereinafter referred to as "the said land") on a resulting trust for and on behalf of the plaintiff.
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> The law
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> If A buys a property using his own money and registers the property in the name of B, by operation of law, it is said that B holds the property on a resulting trust for A. This is actually a settled principle of law.

[8] Learned counsel for the plaintiff's proposition of law in respect of resulting trust subject to exception is correct. However, the plaintiff had never established that the purchase of the property was solely through the plaintiff's money.

[9] In the instant case, no reasonable tribunal properly appraised with the facts of this case will say that the said property was acquired through the money of the plaintiff. Very importantly it is an undisputed fact that a sum of RM185,236 was the deceased's mortgage insurance money related to the charge which was paid into the facility account.

[10] It must not be missed that the bank officers took the position that the property did not belong to the deceased but the bank was instrumental for procuring the insurance coverage as a condition for granting the loan. Had the insurance company known that the property was not the deceased's, the insurance company would have denied coverage based on the trite doctrine of insurable interest. As we have said earlier, the bank officers' evidence was damaging to the standard which was expected to be practised by the bank. The conduct of acquiring the insurance policy as well as receiving the money towards the loan in our view will also attract the concept of fraud and/or criminal conduct against the insurance company which evidence was revealed in this suit. In any event, it is clear from the evidence that it was not the plaintiff's money which was entirely used to secure the property.

[11] The leading English case which anchors the jurisprudence relating to resulting trusts is the statement of Eyre CB in *Dyer v. Dyer* [1788] 2 Cox Eq Cas 92, where His Lordship said that the trust of a legal estate results to the man who advances the purchase price. (See *Issac Iyadurai Nallaperumal & Ors v. Vedha Ratnam Valiappan & Anor* [1993] 4 CLJ 149). In *Tneu Beh v. Tanjong Kelapa Sawit Sdn Bhd & Ors* [1995] 1 CLJ 741, the court refused to find a resulting trust when the purchase money came from a common family fund.

[12] Taking a holistic account of the facts of the case as well as the clouded and/or sham conduct of the plaintiff as well as the bank officers, the court should not have entertained an equitable relief which is discretionary in nature when the general norms of equity had been violently breached. In addition, this is also not a case where the property was acquired through the sole money of the plaintiff. (See *Datuk M Kayveas v. Chong Chek Ah & Ors* [2011] 1 LNS 380; [2011] 9 MLJ 347 (HC); *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949; [2014] 4 MLJ 64 (FC)).

[13] For reasons stated above, we allow the appeal with costs of RM40,000 here and below to the appellant/first defendant, subject to allocatur. The judgment of the High Court is set aside. Deposit is to be refunded.

We hereby order so.